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WHAT FEDERAL PROSECUTORS REALLY THINK: THE PUZZLE OF STATISTICAL RACE DISPARITY VERSUS SPECIFIC GUILT, AND THE SPECTER OF TIMOTHY MCVEIGH

Rory K. Little*

INTRODUCTION

In the face of well-established statistical race disparity in the administration of every capital punishment regime in the United States,¹ the continued prosecution of death penalty cases is a puzzle to some. “How can they *do* that?” think those opposed to capital punishment, of prosecutors in death penalty cases. “Don’t they care about race disparity or systemic racial bias? What can they be thinking?”

I imagine many people attending DePaul University College of Law’s powerful Race to Execution Symposium in October 2003 harbored this puzzled view. However, let me assure you, the view from the “other side”—of prosecutors handling serious death penalty prosecutions—is just as puzzled. “There is no evidence of race bias in *my* case,” such prosecutors think. “And the person I am prosecuting committed not just murder, but an aggravated murder, a heinous murder (or murders). Indeed, I am prosecuting the moral equivalent of Timothy McVeigh.”² Puzzled, those prosecutors wonder: “Do they really expect me to drop the prosecution of Timothy McVeigh because some other cases—not mine—have generated statistical race disparities? Do they really think that this heinous, guilty murderer should be let go? What can they be thinking?”

* Professor of Law, Hastings College of the Law (U.C.). My heartfelt thanks to Professors Susan Bandes and Andrea Lyon for their comments and the original invitation to deliver this paper on October 24, 2003 at the powerful Race to Execution Symposium at the DePaul University College of Law; to Janet Bateman, Hastings Class of 2005 and Assistant Librarian Chuck Marcus, for research assistance and support; and to Beverly Taylor for indefatigable clerical support. Helpful comments from Ash Bhagwat, Evan Lee, Keith Wingate, Janet Bateman and Carol Chodroff saved me from some, but obviously not all, error.

1. “Statistical race disparity” means, simply, that the percentage of defendants sentenced to death, who are African-American, greatly exceeds the percentage (roughly 13%) of African Americans in the general population. See *infra* text accompanying notes 4-28.

2. Timothy McVeigh was executed by federal authorities in 2001 for the notorious Oklahoma City federal building bombing in 1995, which claimed 168 lives and is the most serious episode of domestic terrorism in this country’s history (the World Trade Center destruction being international terrorism). See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

At the Symposium, we heard a variety of eloquent responses to such puzzled prosecutorial thoughts. We also heard about, but did not hear from, death penalty prosecutors. I suppose that is why I was invited.³ This Essay addresses one group of perceivedly “incomprehensible” death penalty prosecutors: those who handle federal cases. Without advocating or opposing capital punishment as an absolute matter, I address the question: What do federal prosecutors really think about race and the federal death penalty?

II. GENERAL THOUGHTS ABOUT RACE DISPARITY AND CAPITAL PUNISHMENT

Five years ago, in 1999, I published a study revealing the now well accepted race disparity statistics generated by the “new” (since 1988) federal death penalty process.⁴ In September 2000, the Department of Justice issued its own study, confirming the “disturbing”⁵ facts that still persist: although the samples are still relatively small,⁶ persons of an ethnic minority continue to compose about 67% of all federal death defendants; about 60% are African American.⁷ As Kevin McNally forcefully demonstrated at the Symposium, the statistics about race and the federal death penalty have not changed.⁸

Of course, given their small number, the statistics on federal *executions* prove nothing at all. There have been only three federal executions in the past forty years, all since the federal death penalty was

3. Before joining the Hastings faculty, I served as a federal prosecutor from 1987 to 1994. More relevantly, I served on the Attorney General's Capital Case Review Committee as an Associate Deputy Attorney General at the United States Department of Justice in 1996 to 1997, recommending the filing, or not, of death penalty notices in federal cases submitted by U.S. Attorneys from around the country.

4. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 476-90 (1999) [hereinafter Little, *History*]. See also Rory K. Little, *Why A Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791, 808-09 (2001) [hereinafter Little, *Moratorium*].

5. See Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 13, 2000, at A17 (also quoting Eric Holder, the Deputy Attorney General (who is also African American), as being “personally and professionally disturbed” in reaction to the 2000 Department of Justice report).

6. Compared to the 3,500 plus persons on stateside death rows in 2002, and the 603 in California alone, there are only twenty-seven people from all states on *federal* death row as of June 2004. See “Federal Death Row, List of Prisoners,” in the “Federal Death Penalty” section of the Death Penalty Information Organization's website, at <http://www.deathpenaltyinfo.org> (last visited June 2, 2004) [hereinafter DPIC website].

7. Little, *History*, *supra* note , at 349-50, 355. Of the twenty-seven persons currently on federal death row, it is reported that seventeen (63%) are black, nine are white, and one is native-American. DPIC website, *supra* note 6.

8. See Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004).

revived in 1988 and given wide effect in 1994:⁹ Timothy McVeigh and Juan Garza in 2001 and Louis Jones in 2003—one Caucasian, one Latino, and one African American.¹⁰ As I have previously noted, the federal government is really just a “bit player” in the larger drama of capital punishment in the United States today.¹¹ Nevertheless, I recognize the symbolic and “modeling” importance of the federal government, here as elsewhere.¹² Thus, it is appropriate to examine the thought processes of federal capital prosecutors.

It may also be noted that the race disparity statistics of federal capital punishment have not always been this way.¹³ There has always been a federal death penalty—the framers so provided in 1790, only months after the Union was formed.¹⁴ From 1811 to 1870, only 16% of the sixty-two recorded federal executions¹⁵ were of African-American defendants.¹⁶ Over 53% were of white defendants, and the rest (over 30%) were of “other” minorities, most likely Native Americans (“Indians”).¹⁷

Notably, once slaves were granted legal citizenship by the federal government, and Reconstruction efforts were having their mixed successes, executions of ethnic minorities soared, to roughly 75% of the total from 1871 through 1890 and 68% from 1871 through 1950.

9. From *Furman v. Georgia*, 408 U.S. 238 (1972), until the Federal Death Penalty Act in 1994, only one rarely employed federal crime, “Continuing Criminal [Narcotics] Enterprise,” enacted in 1988, permitted a federal death penalty. 21 U.S.C. § 848(e) (1988). The 1994 Federal Death Penalty Act (“FDPA”) 18 U.S.C. §§ 3591-3598, and subsequent Acts, have now extended the death penalty to dozens of federal crimes, so that the penalty is now available for virtually any federal offense that includes a nonnegligent homicide. See Little, *History*, *supra* note 4, at 391; DPIC website, *supra* note 6 (listing death-eligible federal offenses).

10. DPIC website, *supra* note 6 (*Execution Database*, search for “Federal executions”).

11. See Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 537, 577 (2000) [hereinafter Little, *Future*].

12. *Id.* at 537, 577-79.

13. *Accord* McNally, *supra* note 8, at 1615 (“Historically, the federal death penalty resulted in executions in roughly the same percentage as racial groups in the population.”). Similarly, Professor William Stuntz has noted that racial imbalance in prison populations increased dramatically in the 1960s and again in the 1980s, with the black prison population increasing from roughly 37% in 1960 to over 50% by 1997. William J. Stuntz, *Race, Class & Drugs*, 88 COLUM. L. REV. 1795, 1796 n.2 (1998).

14. See Little, *History*, *supra* note 4, at 349, 363, 368.

15. The following statistics are based on the extensive and remarkable (if idiosyncratic) database of American criminal executions from 1608 to 1987, compiled by M. Watt Espy and John Ortiz Smylka and known as “The Espy Files,” available on the DPIC website, *supra* note 6. My research assistant, Janet Bateman, and I have compiled the federal executions data as identified in the Espy files. A chart identifying and counting sole federal executions reported in the Espy files is on file with the author.

16. Of course, this relatively low number of African-American executions may have been due to “extra-legal” executions of blacks during this largely slave period.

17. DPIC website, *supra* note 6.

Moreover, after the federal execution of fifty-three persons in the "other" ethnicity category during Reconstruction (1871-1890), the "other" category—minority persons other than African-Americans—became trivially small in the twentieth century, with only three such "other" persons executed federally from 1911 until Juan Garza was executed in 2001. Meanwhile, a total of 112 persons appear to have been executed *federally* in the 20th century.¹⁸ Of this number, seventy-eight were in the District of Columbia, which probably should be considered local rather than federal, as analogous to state executions for nonfederal crimes such as plain murder, because of the absence of parallel state criminal law enforcement authorities and the exclusivity of federal control there.¹⁹ Of the remaining thirty-four federal executions in 20th century, twenty-seven were white, four were black, two were Hispanic, and two Native Americans. Thus, outside of the District of Columbia, federal executions were reserved largely for white offenders throughout the 20th century.

Also sometimes lost in this debate is the point that the term "disparity" itself is a somewhat loaded term because it is dependant on the baseline measure to which one compares the ethnicity of capital defendants. That is, by the last census, African Americans make up less than 13% of the general population, while whites make up 71%.²⁰ If one assumes that these percentages should be similarly reflected in the capital punishment pool,²¹ then "statistical disparity" is well borne out.

Even sympathetic observers, however, like Professor David Baldus, have noted that the general population comparison can be "highly misleading because it fails to control for the disproportionality high percentage of blacks (about 55%) among citizens *arrested* for homicide nationally."²² Thus, critics have suggested that the proper com-

18. Again, these statistics come from examination of the Espy compilation, findable at DPIC website, *supra* note 6. A chart identifying and counting solely federal executions is on file with the author.

19. Of the seventy-eight executed defendants in the District of Columbia, fifty-nine were black and nineteen were white, a likely revealing statistical imbalance even considering the District's large African-American population.

20. POPULATION DIVISION, U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE, AND HISPANIC ORIGIN, *available at* <http://www.census.gov/population/estimates/nation/intfile3-1.txt> (last visited Apr. 15, 2004); see Little, *Moratorium*, *supra* note 4, at 808 n. 116.

21. *But cf.* United States v. Armstrong, 517 U.S. 456, 469-70 (1996) (rejecting such presumptions unless supported by "reliable statistics").

22. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1656 (1998).

parison should not be to general population statistics, but to the more limited set of African Americans and other persons who commit violent felonies, or murders, likely to lead to capital prosecution.²³ This latter statistic is hard to establish with any certainty; calculations appear to range from high to low, depending as much on the politics of the statistician as any other variable. Nevertheless, the general claim that a higher percentage of African Americans than their 13% general population figure are charged with, or convicted of, violent felonies seems to be well accepted even by critics.²⁴ Thus, over 51% of persons convicted of homicide, from 1976 through 2000, were black.²⁵ And about 38% of *all* violent crime arrestees are black.²⁶ These statistics are not so out-of-step with a federal capital "pool" of African Americans at 45%.

In rejoinder, however, thoughtful observers like Professors David Harris and David Cole remind us that *arrest* statistics can themselves be misleading—the product of an allegedly biased law enforcement system.²⁷ That is, arrests and convictions of many African Americans for homicide could be the product of a racially-biased system—in which whites are not arrested or prosecuted for the same offenses as blacks—rather than an indication of innate offender rates. If the criminal justice system is shot through with racial bias as some charge—from the investigative and initial charging stages through jury verdicts and appeal—then statistics generated by that system are not bias-free. In short, "one must remember . . . to exercise caution when using statistics in the debates on crime, in any direction."²⁸ To move

23. See Andrew E. Taslitz, *The Political Geography of Race Data in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1, 2 (2003). The eight articles in this recent issue of *Law & Contemporary Problems*, addressing *The New Data: Over-Representation of Minorities in the Criminal Justice System*, see 66 LAW & CONTEMP. PROBS. (2003), provide an excellent picture of the current statistics, issues, and scholarly thinking in this area.

24. See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 145 (1997); MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* 34 (1995); cf. Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 237 ("[C]ertain federal crimes committed disproportionately by African-Americans are punished more severely than crimes committed disproportionately by whites . . .").

25. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE U.S., TRENDS BY RACE* (2001).

26. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 356 (2002). Also, over 46% of the victims in homicides were black. *Id.* As Professor Kennedy has noted, racial minorities are disproportionately victimized by crime as well. KENNEDY, *supra* note 24, at 145.

27. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 80-81 (2003); see also DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 150-51 (1999).

28. Harris, *supra* note 27, at 72.

our current discussion forward, I propose to simply assume the validity of the statistical race disparity claim at some basic level.

III. I HOPE YOU WILL AGREE: NOT ALL SUPPORTERS OF CAPITAL PUNISHMENT ARE RACISTS

Before I dive completely into the brains of federal prosecutors, I want to briefly mention another race disparity in the capital punishment debate, and then beg your indulgence of my further remarks. As reported in a recent article provocatively entitled "Why Do White Americans Support the Death Penalty?," there is also a racial divide in capital punishment opinion between white and black Americans.²⁹ If we can trust public opinion polls at all, they consistently show that opposition to capital punishment runs around 45% to 55% for black Americans, while for whites it is much lower, ranging from 17% in 1992 to 24% in 2000.³⁰ That is, opposition to the death penalty is about twice as high among black Americans as among white, and a much larger majority of whites than blacks support the death penalty. (However, it is also important to note that these figures also suggest that a substantial minority of black Americans—at least 40%, if not more—*supports* capital punishment. This is a separate, fascinating point in its own right—even more so, perhaps, when it is compared to other polls indicating that over 65% of blacks believe the criminal justice system is racist.³¹)

This racial opinion divide may or may not surprise you. However, far more controversially, this recent article goes on to claim that the high support among white Americans for capital punishment is a product of what the authors call "anti-black attitudes," even when controlled for other personality traits likely to yield support for the death penalty.³² I think there are deep flaws in the Soss article; I do

29. Joe Soss et al., *Why Do White Americans Support the Death Penalty?*, 65 J. POL. 397 (2003).

30. *Id.* at 399 n.2 ("In 2000, black opposition stood firm at 45%."); Pew Research Center poll, July 2003, available at DPIC website, *supra* note 6 ("55% of African-Americans oppose capital punishment, and 39% favor its use."). Presumably, the remaining 6% were "undecided."

31. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 & n.115 (1995).

32. Soss, *supra* note 29, at 400, 409, 414-15, 416. Ironically, if it is true that "white racists are more likely [to] support the death penalty," it is somewhat self-defeating, because the majority of persons executed annually in the United States are, in fact, white, as are the majority of persons on death row. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CAPITAL PUNISHMENT STATISTICS, available at www.ojp.usdoj.gov/bjs/cp/htm (last visited Oct. 10, 2003). In 2002, fifty-eight of the seventy-one persons executed were white; of those on death row, 1,969 were white, 1,538 were black (and seventy-four were "other"). However, I am not ready to accept the claim that support for capital punishment is invariably racist. Indeed, the

not recommend it as a model of dispassionate scholarship. Nevertheless, I am somewhat intimidated by the "strong" version of this claim. Does it mean that any white person who supports the death penalty is a racist? If so, then should my voice, as a white person not invariably opposed to capital punishment, be silenced before I speak? I am confident that at DePaul, with its rich intellectual history and diverse community, the simplistic "racist" label will not be speedily, or thoughtlessly, launched. I urge you to show tolerance for the possibility, at least, that nonopposition to the death penalty might be based on more neutral, fair-minded principles than this claim would suggest, because if you believe that any white American who supports any version of capital punishment must be, at bottom, a racist, then you cannot "hear" my views and pragmatic progress on the issues seems impossible.³³

Moreover, the "white racist" claim overlooks, not only other principled rationales for capital punishment, but also the near majority of black Americans who also say they do not oppose capital punishment.³⁴ The authors of the Soss article might do better to address the question: "Why Do *Black* Americans Support the Death Penalty?" The answers to that question might be more helpful to advance our debate in terms of examining the broad, persistent support for capital punishment in this country. The fact is, in the minds of many Americans, black or white, extremely aggravated killings simply cry out for a morally equivalent penalty.³⁵ The "racist" charge overlooks the possibility that other rationales, besides racist ones, may lead to support for at least some version of capital punishment.³⁶ I ask you to please not dismiss me as a racist before you hear me out. While I cannot escape

large percentage of African Americans that also supports capital punishment, *see* note 30 *supra*, undercuts this claim.

33. "Hear" is used as in the sense of actually listening to their content and giving them an unbiased evaluation.

34. This combines the 40% or more who say they support capital punishment and the 5%, or so, who say they are undecided or give no response. *See* note 30 *supra*.

35. *See* SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 64 (2003) (some say "that it denigrates the profound indignity of murder to punish it in the same fashion as other crimes"). Thus it is the consistent finding of statistical race disparity studies that any racial effect disappears when only "high end" aggravated murders are considered. *See* *McCleskey v. Kemp*, 481 U.S. 279, 366-67 (Stevens, J., dissenting); DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 51, 145, 171, 318, 385 (1990).

36. Indeed, Soss and his co-authors apparently agree, although they do not highlight this in their brief, provocative article. *See* Soss, *supra* note 29, at 411 ("No single factor, taken alone, can explain why most white [and, the authors fail to note, many black] people support capital punishment . . . [A] variety of *nonracial* attitudes and motives drive white [and black] opinion in this policy area" [emphasis added].)

the subconscious biases that any person in any identifiable subgroup may have, I believe my views are founded largely on nonracial considerations. My personal and political perspective is one of a moderate from San Francisco, who hopes his old boss, Justice William J. Brennan Jr., is looking on kindly, if not entirely approvingly, from above.³⁷

IV. FURTHER THROAT-CLEARING: RACE DISPARITIES AND UNCONSCIOUS RACIAL EMPATHY

This Article does not require further examination of the validity of the statistical bases for the race disparity claim in the capital punishment debate; indeed, I want to assume today that the worst-case interpretations are true. Assuming that race disparity in capital punishment is a reality, and that it is indeed disturbing, I want to pursue a different question: Why do federal prosecutors, aware of these disturbing statistics, nevertheless believe that pursuing federal death penalty prosecutions is okay? In other words, if we assume that the statistics showing race disparity in administration of capital punishment are well settled, then many people wonder "How can they *do* that? How can prosecutors keep sending [minority] defendants to federal death row?"³⁸ Or, to put the thought another way, rather than go forward with current capital prosecutions, why not impose a moratorium on all federal death penalty prosecutions and executions while we further study issues of race and capital punishment? I have previously published some of my thoughts on the moratorium issue.³⁹ Here, I hope to provide more specific insights into more basic questions: What are those federal prosecutors thinking? Are they all just racists? How can they keep prosecuting these cases?

This assignment requires that I first reveal my own conscious "bias." I do not believe that most federal prosecutors are racists.⁴⁰

37. Professor Little clerked for U.S. Supreme Court Justice William J. Brennan, Jr. in the 1984 to 1985 term.

38. See, e.g., David V. Baker, *The Role of Profiling in American Society: Criminal Profiling: Purposeful Discrimination in Capital Sentencing*, 5 J.L. & SOC. CHALLENGES 189, 223 (2003). Baker notes, with apparent incredulity, that "even in the face of overwhelming proof that race-based discrimination typifies the imposition of capital punishment in the United States," it persists. *Id.* This view presumes, of course, that statistical race disparity is the product of "discrimination," a claim that actually bears further consideration, as I indicate below.

39. Little, *Moratorium*, *supra* note 4.

40. Some commentators seem to be quick to assume to the contrary, even without probative facts. For example, David Baker cites a statistic that over 90% of state district attorneys (not their assistants) are white, and then immediately asserts that this shows that "prosecutorial decision making may be fraught with racial bias." Baker, *supra* note 38, at 207-08. This seems, however, like racial stereotyping of the worst kind: it appears to presume that all white prosecutors are likely to be infused with "racial bias."

More specifically, I do not believe any federal prosecutor sets out to prosecute a person for a capital offense or seek the death penalty *because* he⁴¹ is black (or Latino, or white), or that any federal prosecutor seeks to treat black or minority defendants worse because of their ethnicity.⁴² Rather, I want to provide you with what I think is actually the prevailing, race-neutral, rationale of good-hearted federal prosecutors for continuing to prosecute federal capital cases in the face of race disparity statistics.

Finally, before I lift the veil, purposeful discrimination—what I would call racism—needs to be distinguished from two related concepts: systemic institutional racism and unconscious racial empathy. Systemic institutional racism, of the sort I have briefly mentioned above, must be separated, as a legal concept, from purposeful discrimination on an individual basis. If all of our institutions are permeated by racism, so that the overall product is racial inequality, then individual death penalty prosecutive decisions can do little to change the situation and would be an unsatisfying place to begin reform. I intend here to focus on individual prosecutive decisions in capital cases, putting aside other vitally important issues of institutional racism as addressed, for example, by Professors Randall Kennedy and David Cole.⁴³ While, of course, the claim of institutional racism is founded on the cumulative effect of thousands of individual decisions, it also masks the individualized nature of any single such decision. This Article focuses on the singular thinking of individual prosecutors as a way of, perhaps, gaining insight into the larger, institutional, issues.

Also to be distinguished from purposeful race bias are the unconscious ethnic biases that all persons, of all races, may hold. I have previously written about what I call “unconscious race empathy” in the context of the federal death penalty,⁴⁴ to which I believe all persons are subject—the unconscious tendency to identify more readily

41. I use “he” because, of course, the most obvious disparity in America’s capital punishment regimes is gender-based. Only fifty-one of 3,557, or only 1.4%, of all persons on death row are women, despite their 50% representation in the general population. U.S. Dep’t of Justice, Bureau of Justice Statistics, *CAPITAL PUNISHMENT*, 2002 (revised Feb. 4, 2004) at 1. No woman has been executed federally since 1953 (Ethyl Rosenberg and Bonnie Brown Hedy). See *Federal Executions Since 1927*, DPIC website, *supra* note 6.

42. Thus, I employ the term “racist” here not in the expansive, generalized sense, which at bottom indicts our entire governmental system, but rather in its more “narrow conventional” meaning, as Professor William Stuntz does: either a desire to harm, or a malign indifference toward, minorities. Stuntz, *supra* note 13, at 1798 n.7.

43. See generally KENNEDY, *supra* note 24; COLE, *supra* note 27.

44. See Little, *History*, *supra* note 4, at 484.

or more closely with members of one's own ethnic group.⁴⁵ Such unconscious race empathy might well explain why close potential capital cases—cases that I might colloquially call “leaners” and Professor Baldus describes as “mid-range” cases in terms of culpability⁴⁶—might go more often against minority defendants. If one assumes that most federal prosecutors, and their investigators, are white,⁴⁷ an unconscious empathy with white defendants and white victims could explain a greater proportion of “no death” recommendations in such cases, as opposed to death-eligible cases with minority defendants, or victims, or both.⁴⁸

If one accepts the concept of “unconscious racial empathy,” then the fact that race disparity seems apparent from the earliest stages of the criminal process—initial investigation and charging decisions—is perhaps unsurprising, because most criminal law investigators and prosecutors (at least federally) are white. Yet, as far as I know, no study of capital prosecutions has ever been done with an eye toward “race of prosecutor” and “race of investigator.”⁴⁹ Indeed, even the simple statistics regarding the ethnic make-up of federal prosecutors and federal law enforcement agents are difficult to assemble. Regarding federal prosecutors, no source I have found reports the ethnicity of the roughly 5,000 Assistant U.S. Attorneys in this country, although a recent Department of Justice “Diversity Report” found that 85% of all Department of Justice lawyers (civil, criminal, and others) are white, while only 8% are African American.⁵⁰ The only other reported study of the racial composition of prosecutors of which I am aware examines state, not federal, prosecutors. In 1998, Professor Jef-

45. I am hardly the first scholar to identify this phenomena and link it to race disparity statistics. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

46. See, e.g., BALDUS ET AL., *supra* note 35, at 185, 318.

47. This is almost certainly more than just an assumption. See *infra* notes 49-53. See also Baldus et al., *supra* note 22, at 1724 (“In many places in the United States, prosecutors, judges, and penalty trial jurors are predominately white.”).

48. Statistical race disparity claims focus on the race of capital defendants. However, the more stark and consistently demonstrated statistical race effect in capital cases is race of victim: cases with white victims (and, even more so, black defendants and white victims), yield death sentences more frequently than other combinations. See BALDUS ET AL., *supra* note 35, at 162, 257, 399; McClesky v. Kemp, 481 U.S. 279, 286 (1987).

49. In 2000, I was part of a consortium that proposed to conduct such a study of the federal system. However, a different study group was selected for study by the Department of Justice, and to date, the details and results of that research effort have been kept well under wraps.

50. Vanessa Blum, *Report Offers Detailed Look at DOJ Lawyers: Many Women, Minorities Find Jobs in Lower Ranks, but Not at the Top*, LEGAL TIMES, Oct. 27, 2003. The full DOJ Report is available at <http://www.usdoj.org>. (last visited Apr. 28, 2004).

frey Pokorak laboriously assembled statistics on district attorneys (but not their more numerous and decision-influencing assistants), albeit only in the thirty-eight death penalty states, and found that over 97% of them (1,794 of 1,838) were white.⁵¹

As for federal criminal investigators, more facts are known: of over 93,000 federal officers authorized to carry firearms and make arrests in 2002, over 67% were white and less than 12% were African American.⁵² These statistics, however, encompass over twenty different federal agencies, including the Immigration and Naturalization Service, the U.S. Capitol Police, and the Fish and Wildlife Service. More relevant, perhaps, for federal capital cases are the facts that the Federal Bureau of Investigation's agent workforce is over 83% white and less than 6.5% black, and Drug Enforcement Agency agents are over 82% white, and less than 8% black.⁵³

There is a strong argument that front-line federal prosecutors (as opposed to Main Justice reviewers) and law enforcement officers are the most influential decisionmakers in the federal capital arena, despite a review requirement that runs all the way to the Attorney General.⁵⁴ That is, it is the agents, and usually not the prosecutors, who are the first to identify suspects, decide who to pursue and how vigorously. The "case agent" is often the first to recommend the case for prosecution to a federal prosecutor, and these two (the case agent and the line prosecutor) often discuss the possibility of capital punishment together before pushing the case further "up the stream" of supervision. Absent a desire of these initial actors to go forward on a capital basis, it is difficult (albeit not impossible) to successfully sustain a capital effort.

Of course, most potential federal capital cases have some notoriety immediately, and I am not suggesting that the decision to pursue capital punishment is made quietly, by only two actors, or without immediate pressure from outside sources. Nevertheless, in my experience as a federal prosecutor of some eight years, and a supervisor for five

51. Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817 (1998).

52. Brian A. Reaves & Lynn M. Bauer, *Federal Law Enforcement Officers, 2002*, BUREAU OF JUSTICE STATISTICS BULL., Oct. 2003, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf> (last visited Apr. 15, 2004).

53. *Id.* at 7. The FBI and DEA are the "lead agencies" in virtually all federal death penalty cases.

54. Since at least 1988, U.S. Department of Justice regulations—but not the statutes—have required that the Attorney General personally approve the filing of all federal death penalty notices. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-10.020, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.020 (last visited Apr. 15, 2004); see Little, *History*, *supra* note 4, at 407-08 n.325, 436 n.436.

of those years (the last as a Main Justice reviewer of capital cases), I firmly believe that the line prosecutor and lead investigators often have a large, if not primary, influence on the charging and sentencing contours of potential federal death penalty cases.

Further evidence of this can be found in the fact that the racial "mix" of federal capital defendants is set by the time potential capital cases get to Main Justice for review, and it does not change appreciably once there.⁵⁵ Main Justice's capital case review system is "race blind" and has been since 1996.⁵⁶ Once a case arrives at Main Justice for review, it carries with it a recommendation (either death or no death) from the outlying U.S. Attorney's office, and all race-identifying data is stripped from the file at Main Justice. Thus, the decision at Main Justice as to whether to approve the case as a capital one is generally free from racial considerations. Yet the "yield" from this process, statistically, contains roughly as many black defendants going out as it did coming in. Thus, it is the initial pool of referrals to Main Justice that is statistically racially disparate. Racism, if it exists, is occurring earlier in the process. I believe the effects occur at the earliest stages: case investigation and prosecutorial intake.

By definition, however, unconscious empathic bias cannot be identified and corrected by the unconscious individual actors. Institutional responses are necessary to eliminate, or correct for, such unconscious influences. What I want to address now is what individual federal prosecutors, attempting to act in a good-faith, race-neutral way, *consciously* think about their capital prosecutions.

V. WHAT FEDERAL PROSECUTORS REALLY THINK: THEIR DEFENDANTS ARE ALL GUILTY AND ARE ALL TIMOTHY McVEIGH

Having concluded my substantial throat-clearing, let me tell you what federal prosecutors really think: They think that the defendants they prosecute are guilty. In the capital context, really guilty. No matter what statistics may say generally, federal prosecutors think that their individual defendants deserve the death penalty on the specific facts presented. They think this regardless of other systemic or institutional problems, which they believe they can do little to correct. They have reviewed their cases and found no overt evidence of racism.⁵⁷

55. See Little, *Moratorium*, *supra* note 4, at 810.

56. Little, *History*, *supra* note 4, at 411-12.

57. My account assumes that if federal prosecutors *do* find evidence of overt racism in their pursuit of a potential capital case, they will address it and not ignore or bury it. Thus, a racist

Thus, federal prosecutors are unwilling to drop cases against specific, heinous defendants as a response to some general problem they do not find present in their specific cases. They are prosecuting specific, guilty, horrible people. Unless the death penalty is entirely abolished—a policy decision that is “above their pay grade,” as they see it—federal prosecutors simply do not understand the abolitionist’s perspective. Instead they think, “*This person is guilty and deserves the death penalty.*”⁵⁸ Why would we drop a prosecution of this specifically guilty and morally repellent person, in response to problems *not* present in this case?” Thus, federal capital prosecutors are at the other end of the logical disconnect that some see in their position.

This is the problem with translating general race disparity statistics into specific prosecutorial action. It is the problem of the general versus the specific.⁵⁹ Even assuming that federal prosecutors are unquestioningly aware of the race disparity statistics, and that they recognize that, as a general matter, the race statistics generated by the system as a whole are “troubling,” they still do not believe that their individual cases are the product of anything other than race-neutral, specific facts—and usually screamingly heinous specific facts. Before federal prosecutors charge a federal capital case, they thoroughly examine their case files looking for flaws. Such “flaws” could include evidence of racial bias, or some other misconduct, or simply evidentiary flaws. (If federal prosecutors are not doing this, it is unethical incompetence, pure and simple.) And if they find such flaws, they respond accordingly, which could include not charging the case capitally or even not charging it at all. Federal prosecutors who find evidence of overt race bias in their cases do not—or certainly, ought not—ignore or bury it. It is too strategically risky—let alone ethically disturbing—to let such sleeping issues lie.⁶⁰

remark from an investigator, major witness, or fellow prosecutor, should be addressed and brought to the attention of supervisors. Appropriate discipline should be considered. Most importantly, the case should be thoroughly and independently reviewed to ensure that racial considerations have not materially affected the investigative or charging decisions in the case.

58. See TUROW, *supra* note 35, at 64 (“The issue is not revenge or retribution, exactly, so much as moral order [C]apital punishment makes an unequivocal moral statement.”).

59. This is the same difficulty confronted in *McCleskey*: specific jury decisions about guilt were held to outweigh, or outweigh, a strong statistical showing of generalized racial disparity. “The capital sentencing decision requires the *individual* jurors to focus their collective judgment on the *unique characteristics* of a *particular* criminal defendant.” *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (emphasis added).

60. For example, the failure of the O.J. Simpson prosecutors to surface and address the overtly racist remarks of one of the investigating Los Angeles Police Department officers, Mark Fuhrman, was viewed as a large contributing factor in the ultimate not guilty verdicts. See Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219, 244 & nn. 162-64 (1998).

But what a federal prosecutor will not do—indeed, what no prosecutor will ever do—is stop prosecuting an individual case that does not exhibit such specific flaws as a response to some general problem—even a problem genuinely existing and generally recognized, but not present in his or her individual case. Federal prosecutors think: “It’s not present in my case.” They believe their capital defendants are first, factually guilty of the murder(s) and, second, factually deserving of the death penalty. Only specific, individualized evidence, specific to each case, can change this prosecutive decision once it has been carefully made. Generalized concerns about capital case results simply do not translate into case-specific action.⁶¹

So, what federal prosecutors really think is, while there may be systemic problems with the administration of capital cases, those problems have not infected their specific cases. And, absent an individualized reason not to go forward, they think deserving death-eligible murderers should be prosecuted to the fullest extent of the law. Even if racism in fact permeates our society so that poor black youths have less chance of avoiding the criminal justice system, and even if that system then generates drastically disproportionate results along racial lines, those institutional problems cannot be solved by dropping their specific case.⁶²

When actual federal death penalty cases are examined, it is easy, perhaps, to understand this thinking. Let’s take the easiest case first: Timothy McVeigh, otherwise known as “the poster child for the federal death penalty.”⁶³ McVeigh was a white male who intentionally blew up the Oklahoma City building in 1995 and killed 168 people, nineteen of them children whom he could see through the second-floor daycare windows as he parked his truck full of explosives.⁶⁴ His is the quintessential “high end” case, which Professor Baldus’s landmark study and others have suggested produce no “race bias” ef-

61. This is not to say we cannot build in systemic protection against the influences of racism for future cases as a response to identified potential problem areas. We can, and we should. See *infra* notes 85-98 and accompanying text.

62. See COLE, *supra* note 27, at 183 (noting that one “obstacle to remedying the criminal justice system’s disparate treatment . . . is that any solution . . . is likely to be constrained by forces beyond the system”). Cf. *McCleskey*, 481 U.S. at 308 (“Even Professor Baldus does not contend that his statistics *prove* that race . . . was a factor in McCleskey’s particular case.”).

63. The label is mine, used in any number of past presentations. Accord Richard Willing, *Even for Death Penalty Foes, McVeigh Is the Exception: Worst Mass Murderer in U.S. History Tilts Debate over Capital Punishment*, USA TODAY, May 4, 2001, at 1A.

64. *United States v. McVeigh*, 153 F.3d 1166, 1177 (10th Cir. 1998).

fect—that is, defendants in high-end cases routinely are selected for capital prosecution and verdicts, without regard to race.⁶⁵

Should a federal prosecutor decline to seek the ultimate penalty for Timothy McVeigh because of statistical race disparity in the overall administration of the federal death penalty? For prosecutors, at least, that question answers itself: No. Is the rationale for this answer too self-evident to state? McVeigh was undisputedly guilty. As a white male, he made no claim (and had no plausible claim) of race bias. Meanwhile, his crime, the harm caused, and his unrepentant lack of remorse, easily fit the profile of a deserving, highly aggravated capital case.

But, more modestly, perhaps, should we impose a “moratorium” on Timothy McVeigh’s execution, while we study the system for insidious sources of race bias and examine new ways to protect against it? Again, prosecutors would generally respond no—even clear findings of race bias, and new mechanisms to protect against it, would do no good for Timothy McVeigh.⁶⁶ His was a clear case of guilt, heinous facts, and absence of race bias. Unless one is an opponent of all capital punishment, race disparity ought not stay McVeigh’s capital prosecution or execution.

Bluntly put, federal prosecutors think that there are only “Timothy McVeighs” on federal death row: heinously guilty men (there are no women; talk about bias!) whose guilt is frankly undisputed.⁶⁷ As I have previously described, the result of the federal death penalty system—in contrast to any state systems of significance—has been, so far, to place only “high-end” males on federal death row.⁶⁸ That is, what I call the “Stevens Solution” (after Justice John Paul Stevens’s dissenting opinion in *McCleskey v. Kemp*⁶⁹) has actually been imple-

65. See, e.g., BALDUS ET AL., *supra* note 35, at 151. (“[W]hen the crime involved was . . . extremely aggravated . . .” death sentences were imposed “regardless of racial factors.”).

66. See Little, *Moratorium*, *supra* note 4, at 811-812.

67. See, for example, the cases of David Hammer (murdered his cellmate), Marvin Gabrian (murdered four white victims including a three-year-old child), Keith Nelson (kidnapped and murdered a ten-year-old girl), and Richard Jackson (kidnapped, raped, and murdered a twenty-two-year-old woman). DPIC website, *supra* note 6 (*Federal Death Row: Synopsis of Cases*).

68. Little, *Moratorium*, *supra* note 4, at 800-07. As I mentioned in that article (*id.* at 805), the case of federal death row occupant Jeffrey Paul gives me pause, not on the axis of guilt in the evidence in the public record, but on the axis of “heinousness” (not very) and identifiable federal interest (none that I can see other than that the crime was committed on federal parkland). Paul has a significant federal habeas corpus petition pending, and it remains to be seen whether he will remain on death row.

69. 481 U.S. at 367 (Stevens, J., dissenting) (“If Georgia were to narrow the class of death-eligible defendants to those categories [of “extremely serious” murders], the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”)

mented de facto in the administration of the federal death penalty. Only high-end, factually-compelling and innocence-claim-free defendants make it through the entire federal capital case review system to death row intact.⁷⁰ So long as this remains true,⁷¹ it is difficult to see how race disparity statistics alone would stop their prosecution.

But perhaps McVeigh's case is too easy—the sort of exception that might prove the rule. Let us then briefly examine other cases currently on federal death row. But before we do, let me say this. I firmly believe that every federal capital case should receive the most thorough examination possible, both before and after the prosecution, for the existence of problems known to have infected capital prosecutions in general: race bias, prosecutorial or investigatorial misconduct, substantial trial error, and (perhaps most importantly) plausible claims of innocence (this should include “penalty innocence”).⁷² Indeed, I think federal executions are so important that I would advocate a second layer of Department of Justice review, by a team of independent and experienced federal lawyers, of each federal death penalty case prior to the final execution date. I do not think that the federal government should execute if responsible attorneys have lingering doubts. This does not mean that a prosecutor's trial or other

70. One might think there is irony here: the “Stevens Solution” has been de facto implemented in the federal system, and yet statistical race disparity persists, seemingly in defiance of Professor Baldus's finding that race disparity drops out in high-end capital cases. However, while this seems true in individual cases, the federal system still has no controls for race at the “front end” of case investigation and initiation. Also, the Baldus study showed no race-disparities for high-end cases *after* controlling for dozens of other variables. BALDUS ET AL., *supra* note 35, at 62-66, 397. The federal results have not (yet) been so carefully filtered.

71. There is anecdotal information emerging to suggest that the current administration under Attorney General John Ashcroft may be lowering the standard of aggravation for approval of federal capital prosecutions. See generally John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1697-98 & n.2 (2003). The Federal Death Penalty Counsel group reports that, of the last twenty-two federal capital cases to go to trial, only one has resulted in a death verdict, while three have resulted in complete acquittals and seventeen in life sentences. Adam Liptak, *U.S. Joins Request To Delay a Capital Case*, N.Y. TIMES, Oct. 18, 2003, at A10. If this is so, it is a disturbing trend because much of the validity of the federal capital system, in the face of mounting criticism of death penalty regimes in general, has been staked on its careful selection of highly aggravated, clearly-guilty cases.

72. The best federal example of penalty innocence might be the case of Ronald Chandler, who claimed that the murder he allegedly directed had, in fact, been perpetrated by the actual killer for personal reasons (the victim had allegedly abused the killer's sister and mother) and not for the aggravating reasons that made the death penalty available. Chandler's case evenly divided the en banc United States Court of Appeals for the Fourth Circuit (having the effect of affirming his death sentence), see *Chandler v. United States*, 218 F.3d 1305 (4th Cir. 2000), and President Clinton commuted his death sentence in his last days in office. See Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 530 n.12, 567-69 (2000); Little, *Moratorium*, *supra* note 4, at 791 n.2.

strategic decisions, or a jury's determination of "justification" for the capital sanction under the statute, should be second-guessed or overruled based simply upon hindsight disagreement. Placing our faith in prosecutorial discretion and in juries is required by statute and (the Supreme Court has recently indicated) the Constitution.⁷³ But an internal Department of Justice process of secondary review, after a death sentence is imposed but prior to execution, by an independent team with sufficient experience and institutional protection to make completely independent recommendations to the Attorney General, could provide one final check against excesses, errors, and biases. Call it the "Department of Justice Innocence Review Unit." Such a review would not have to require great delay or expenditures; it could be conducted concurrently with the appellate process, or speedily after the defendant's first (and, legally, only) habeas petition is finally declined. Secure independence, however, and not unwarranted speed, is the key to this idea. Such a system would create even more public confidence in the system and further demonstrate the excellence of the federal system.

But, one could say, that's all well and good about Timothy McVeigh and other heinous white defendants on federal death row—but of course, they are not the object of our concern. What about the black defendants in the federal system? They are the ones "obviously" harmed by race bias.⁷⁴ What about them?

There are, of course, more of them than there are white defendants on federal death row. But I am constrained to say, upon examination of their cases, that it is difficult to separate them from what I have said about McVeigh, because of the highly aggravated and innocence-free nature of their cases.

Again, it is easiest to take the simplest cases first: Anthony Battle, for example, who murdered an African-American federal prison guard with a hammer while already serving a life sentence for the murder of his wife;⁷⁵ or Darryl Johnson, who was convicted for directing two murders as a leader in a drug-dealing gang—one victim was a confidential government witness against Johnson—and is al-

73. 18 U.S.C. § 3593 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *McCleskey*, 481 U.S. at 311-12; *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

74. Note, however, that *white* federal defendants have also alleged race bias since the 2000 DOJ study came out, claiming that whites are being "over selected" in order to "make up for" the prior disparities. None of these claims has been found plausible by a reviewing court, however.

75. *United States v. Battle*, 979 F. Supp. 1442 (N.D. Ga. 1997), *aff'd*, 173 F.3d 1343 (11th Cir. 1999), *cert. denied*, 529 U.S. 1022 (2000). Battle claimed to be insane, but the jury rejected this defense. *Id.* at 1469.

leged to have directed four more;⁷⁶ or Aquila Barnette, who murdered the driver of the car he randomly hijacked in North Carolina on his way to successfully murder his former girlfriend in Virginia.⁷⁷ Or the eight other black defendants on federal death row who have been convicted of multiple victim homicides.⁷⁸ Frankly, none of the cases of black defendants on federal death row involve anything other than aggravated facts.⁷⁹ More importantly, none of these cases involve claims of actual innocence. Many include undisputed confessions to the murders. So far as I am aware, none are founded primarily on claims of misidentification, doubtful confession, or questionable jailhouse or codefendant snitches, and in all, the government placed substantial amounts of corroborating evidence before the jury.

Now let me be clear: I am not saying that all of these cases are flawless or that they uniformly embody indisputably valid convictions and sentences. It is too early to say that about some—Julius Robinson, for example (a drug-gang leader convicted of three homicides), has not yet had even his first appeal. The federal system, while better than others, is far from perfect. And, significantly, since 1988 there have been five federal capital defendants taken off of death row by judicial (and in one additional case, presidential) intervention.⁸⁰ My view is that this is evidence that the overall federal system works and catches errors—but it also makes it clear that no capital system is flawless. Particularly given the anecdotal evidence that the current Administration is lowering federal capital case aggravation standards, we cannot become blasé about the federal, or any other, capital punishment regime. Constant vigilance is, indeed, a cost of liberty.

In addition, there are currently sixty-nine defendants awaiting federal capital trials whose cases have not yet been developed sufficiently, let alone judicially reviewed, to make a judgment about their legitimacy. Nevertheless, brief summaries of their facts, even as written by federal defense counsel, suggest that many, if not all, fit the aggravated profile of federal capital cases provided above.⁸¹

But this is becoming tangential. My point is that, so far as I know, in none of the current black-defendant federal death row cases has

76. *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000).

77. *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000).

78. See David Bruck et al., *Summaries of Cases Authorized for the Death Penalty: 1988-2002*, at http://www.capdefnet.org/fdprc/contents/summaries_of_cases/case_summ_frame.asp (last visited Apr. 15, 2004).

79. See *supra* note 70 (speculating that aggravated facts, and not race, may explain their presence on federal death row).

80. DPIC Website, *supra* note 6.

81. See Bruck et al., *supra* note 78.

there ever been offered any specific evidence of overt race bias, in their prosecution or their capital selection. Their facts are aggravated, their claims of innocence are implausible or nonexistent, and their cases have been reviewed by many lawyers and judges alike. What is a federal prosecutor handling one of these cases to think when he or she is told that statistical race disparities are being generated systemwide? That he or she should, *therefore*, drop the capital prosecution of such heinous individual defendants? I emphasize the “therefore” because it is the causal link suggested by that word that federal prosecutors see as missing from their specific cases. How will dropping the death penalty against their adjudgedly guilty, heinous, and deserving defendant (black or white) advance the cause of race equality? Particularly when the victims are also black—as is true for at least nine of the fifteen black defendants on federal death row⁸²—how is racial justice served by dropping their otherwise seemingly valid prosecutions?⁸³

Again we have the problem of the specific versus the general. Even a federal prosecutor who is genuinely troubled by general race disparity in the system is not going to drop a patently legitimate specific case as a response, whether the defendant is black or white.⁸⁴

VI. WHAT CAN WE DO ABOUT IT? WORKING TOWARD A FAIRER (NOT ABOLISHED) CAPITAL PUNISHMENT SYSTEM

In sum, opponents of capital punishment who argue that recognized statistical race disparities are a reason to drop capital prosecutions, face a significant hurdle. Federal prosecutors—indeed, prosecutors of all stripes—do not think that generalized statistical race disparities are a logical reason to drop any specific prosecution (capital or otherwise). They believe there is a logical disconnect between the two

82. *Id.*

83. See Patty Reinert & Richard Stewart, *3rd Defendant Gets Life Sentence in Jasper Man's Dragging Death*, HOUS. CHRON., Nov. 19, 1999, at A1 (discussing case in which three white defendants, at least two of whom belonged to white supremacy groups, offered a disabled black man a ride in their truck and then chained him to its rear bumper and dragged him to his death); *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000) (affirming conviction and death penalty). *But see* George Kendall, Remarks at the DePaul University College of Law Race to Execution Symposium (Oct. 24, 2003) (transcript on file with the DePaul Law Review) (criticizing use of “tabloid journalism” to raise emotions regarding capital cases).

84. A further claim, that black (but not white) capital defendants should be benefitted due to statistical race disparity, without specific problems of race evidenced in their cases, is itself a kind of race consciousness that is troubling and pretty obviously not constitutional. To be fair, I do not know of any scholar who has recommended such race-conscious relief in the capital context. *But cf.* Butler, *supra* note 31, at 679 (arguing that, in light of systemic racism, “it is the moral responsibility of black jurors to emancipate some guilty black outlaws”).

ideas, a lack of causal relationship that is insurmountable in their minds.

In this sense, it does not matter what race Timothy McVeigh, or any other aggravated killer, is. Indeed, as studies have repeatedly shown, race largely drops out in the face of extremely serious case-specific aggravation. For prosecutors, and indeed most Americans, Timothy McVeigh and his moral equivalents (of any ethnicity) loom too largely in the opposite direction to justify banning the death penalty entirely, let alone dropping any particular aggravated case unless case-specific problems are shown.⁸⁵

Given this logical difficulty, this general verses specific "Timothy McVeigh problem," it seems more fruitful to me to work for incremental improvements in the system. I recognize that some opponents of capital punishment believe that working to improve the system is counter-productive: a system that works badly is more likely to persuade people to the abolitionist position than one that is free of complaints other than the penalty itself. However, as one who is agnostic about whether Timothy McVeigh should live or die, I cannot share that view. A capital punishment system that is free of race bias seems, to me, better than one that is not. Thus, limiting the system to "high-end" aggravated cases only, in which race bias seems to disappear, seems like a worthy goal. Eliminating or greatly reducing reliance on other now-recognized problem factors, such as eyewitness misidentifications, coerced confessions, and lying snitches⁸⁶ should also be attempted. Legislators should work to refine and narrow their statutes to eliminate the disparate unevenness of existing "mid-range" capital punishment systems.

Thus, there are a range of improvements that can and should be made to capital punishment systems in America today, some specific to the federal system, others more general.

First, for example, are the improvements recently adopted in Illinois, as a result of that states's remarkable experience with actually innocent capital defendants, subsequent moratorium, and the resulting Report of the Commission on Capital Punishment.⁸⁷

85. Willing, *supra* note 63 (reporting "that of the 38% of Americans who say they generally oppose the death penalty, more than half have come to believe that McVeigh should be executed anyway").

86. See the landmark explication about the unjust influence of such factors in SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

87. The Report is available at www.idoc.state.il.us/ccp/index.html. (last visited Apr. 28, 2004). Noted author (and lawyer) Scott Turow has published an astute and eminently readable account

Second, we should strive to eliminate categorical areas of identified problems from the pool of "death-eligible" offenses. Thus, a legislature can, and should, require that no case may go forward as a capital prosecution if the Government's case would be based primarily (not solely, which is too easy to manipulate) on: (1) a single eye-witness identification; (2) a confession unless judicially determined to be reliable beyond doubt; (3) "junk" science; and (4) either jailhouse or other "flipped" criminal snitches, who have proven over time to be far too amenable to their obvious incentives to lie.

Third, we should restrict capital punishment to "high-end" cases with defined, extremely aggravating, factors. This could be done statutorily or as a matter of prosecutorial policy. But it would necessitate removing certain vague or too easily manipulated statutory "aggravating" factors that are commonly used today, such as "heinous or atrocious," "committed for pecuniary gain," or "committed in conjunction with another felony."⁸⁸ More individualized or clearly defined, and limiting, words will have to be used instead. For example, "multiple victims," "tortuous killing beyond the norm of common murders," "victim particularly vulnerable by reason of youth (under eighteen), age (over sixty-five), or mental incapacity (mentally retarded, etc)," and "hired assassin killing."⁸⁹

Inevitably, when death-eligible categories are so narrowed, there will be cases that some might feel still merit the death penalty but that fall outside the narrowed categories. But—and this is important and too easily overlooked—there should be *no* "catch all" category to address this perceived problem. Instead, "erring" on the side of no-death in close or unanticipated cases is simply a "cost" of having a truly limited, high-end, capital punishment system. Selection of some killers for life-without-parole sentences, which may seem arbitrary in an individualized case analysis, is actually a certain and necessary result of any good faith semantic effort to limit capital prosecutions to those cases in which nefarious considerations such as race will not play even an unconscious role. Could the result be to bring us closer to a

of his experience as a member of the Illinois Commission and a very balanced account of the current capital punishment debate in general. See TUROW, *supra* note 35.

88. See Little, *History*, *supra* note 4, at 490-500 (discussing the manipulability of language in capital statutes).

89. Professor Andrea Lyon has pointed out to me that even these terms may not be adequate. "Multiple victims," for example, can sweep in too broad a range of cases, from the quick panic shooting of store owners in a robbery, to (for example) the intentional starvation of children or terrorist killing of hundreds. I agree that intense work and debate should be had on every term before it is included in a capital statute. The goal is to find semantics that truly will limit the death penalty to high-end killers, without being amenable to mid-range manipulation. See Little, *History*, *supra* note 4, at 490-500.

death penalty so rarely imposed that it echoes Justice Potter Stewart's arbitrary "in the same way that being struck by lightning" is arbitrary critique in *Furman v. Georgia*?⁹⁰ I think not—not in the sense of being totally unpredictable or seemingly indistinguishable between death-eligible and ineligible cases. Rather, such a system would self-consciously limit "lightning" to a narrow group of aggravated killers and allow some to escape death due to the inevitable inadequacy of legislative action, semantics, or lawyering. Yes, such a system will (a) yield fewer actual death penalties, and (b) leave some serious murders unpenalized by death. But it will also leave us far more confident that only high-end killers are being selected for the penalty and with no lingering statistical race disparity concerns. These are costs and benefits of a fair and unbiased system that *supporters* must be prepared to accept in the face of the clear evidence of race disparity, and actual innocence, that has come to be so widely accepted in the last ten years.

Fourth, trial judges must become far more rigorous in enforcing the command of *Batson v. Kentucky*.⁹¹ We cannot allow the subterfuge of "race-neutral explanation" to achieve the insidious effect of routinely eliminating African-American jurors from capital juries.⁹² Judges have full discretion to order that stricken African-American jurors remain when the circumstances suggest impermissible race-based strikes.⁹³ The willingness of trial judges to silently accept the practice of disguised, race-based juror strikes must come to an end. Moreover, appellate courts must be fearless in reversing when it is evident that the trial court has failed.⁹⁴

As for the federal death penalty process in particular, a number of improvements should also be made. First, as described above, the federal system, at least, should institute a final, internal, but professional and independent review, of all cases that result in a death sentence. A final Department of Justice "Innocence Review" before federal ex-

90. 408 U.S. 238, 309 (1972).

91. 476 U.S. 79 (1986). *Accord* COLE, *supra* note 27, at 188-89.

92. *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995) (per curiam) (holding that a proffered "neutral" explanation need not be "persuasive" or even "reasonable" to suffice under *Batson*) is an example of a failure to administer *Batson* effectively. *See id.* at 777 (Stevens, J., dissenting) (Judicial tolerance of "silly, fantastic, and implausible explanations" interferes with "meaningful judicial review.").

93. *See* *People v. Johnson*, 30 P.3d 270 (Cal. 2003), *cert granted*, 124 S.Ct. 817 (2003) (addressing how easily provable the standard, or "trigger," for establishing a prima facie *Batson* case should be).

94. *See, e.g., Miller-el v. Cockrell*, 537 U.S. 322 (2003). *See also* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

ecutions will provide strong public support for the results, even in the face of increasing concern over state systems.

Second, there must be strict enforcement of the “substantial federal interest” requirement for federal capital prosecutions, and the Ashcroft amendment to the protocols that allow the availability of the death penalty itself to fulfill this requirement should be abolished.⁹⁵ Most murder cases should remain at the state level, and the simple fact that a state has chosen not to enact a death penalty should not be sufficient without a more identifiable “federal” interest to drive a case into the federal system.⁹⁶

Finally, further study is required. Race bias, if it is a significant factor, would seem to have its largest influence at the very earliest stages of the capital case investigative and prosecutive process. I have noted above that the race of federal criminal investigators or the “line” federal prosecutors could have an influence here.⁹⁷ Yet there are no studies of these factors in capital decision making of which I am aware. Study should be conducted, in the federal system, of the influences of “race of case agent” (the agent or agents identified as having initial or primary authority for any particular potential capital case), and “race of line Assistant U.S. Attorney,” (the Assistant U.S. Attorney who is first contacted about a potential capital case or is given initial responsibility for further investigation and prosecutive recommendations). If there is no detectable or overt race bias here, then the Department of Justice will have nothing to fear from such a study, and substantial amounts of public trust to gain. On the other hand, if these are potential sources of identifiable race bias, then responsible governmental figures should prefer to investigate, and do what can be done to ameliorate, the situation.

VII. CONCLUSION

Statistical race disparity does not prove purposeful racial discrimination in federal capital prosecutions. Nevertheless, it is a persistent

95. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.070, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrn.htm#9-10.070 (last visited Apr. 15, 2004); see Little, *History*, *supra* note 4, at 413-14 (discussing “federal interest” requirement). Under Attorney General Janet Reno, the DOJ Capital Case Protocols provided that “the fact that the maximum Federal penalty is death is insufficient, standing alone, to show a more substantial interest [than a state's] in federal prosecution.” This provision was repealed in 2001 under Attorney General Ashcroft.

96. See Rory K. Little, *Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*, 14 FED. SENTENCING REP. 7 (2001).

97. See also Little, *History*, *supra* note 4.

and disturbing fact. Lingering doubts remain that it occurs due to sub-conscious or attenuated systemic biases impossible to isolate or detect, but which are harmful nevertheless.

However, generalized race disparity alone cannot logically require dismissal of deserving capital prosecutions in the minds of prosecutors who have carefully determined the facts and fairness of their individual cases. Arguments about race disparity will never persuade supporters of capital punishment to the position of abolition, or even moratorium, for guilty, heinous, "high-end" killers. Indeed, "race disparity" appears to disappear in such high-end cases.

On the other hand, reform of existing capital punishment structures, to truly narrow and limit their results to such indisputable high-end cases, is a solution that can appeal to supporters and opponents alike. Legislators and prosecutorial policymakers should turn their attention to such reforms now.⁹⁸ The perfect should not be the enemy of the good. A narrowed, but bias-free, capital punishment system would be better than what we currently have.

98. Such efforts are already underway in a number of states. See Laura Mansnerus, *States Seek Ways to Make Executions Error Free*, N.Y. TIMES, Nov. 2, 2003, § 4 (Week in Review), at 5.